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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.
No. 469

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

MERCY BROWN STEPHENS,
Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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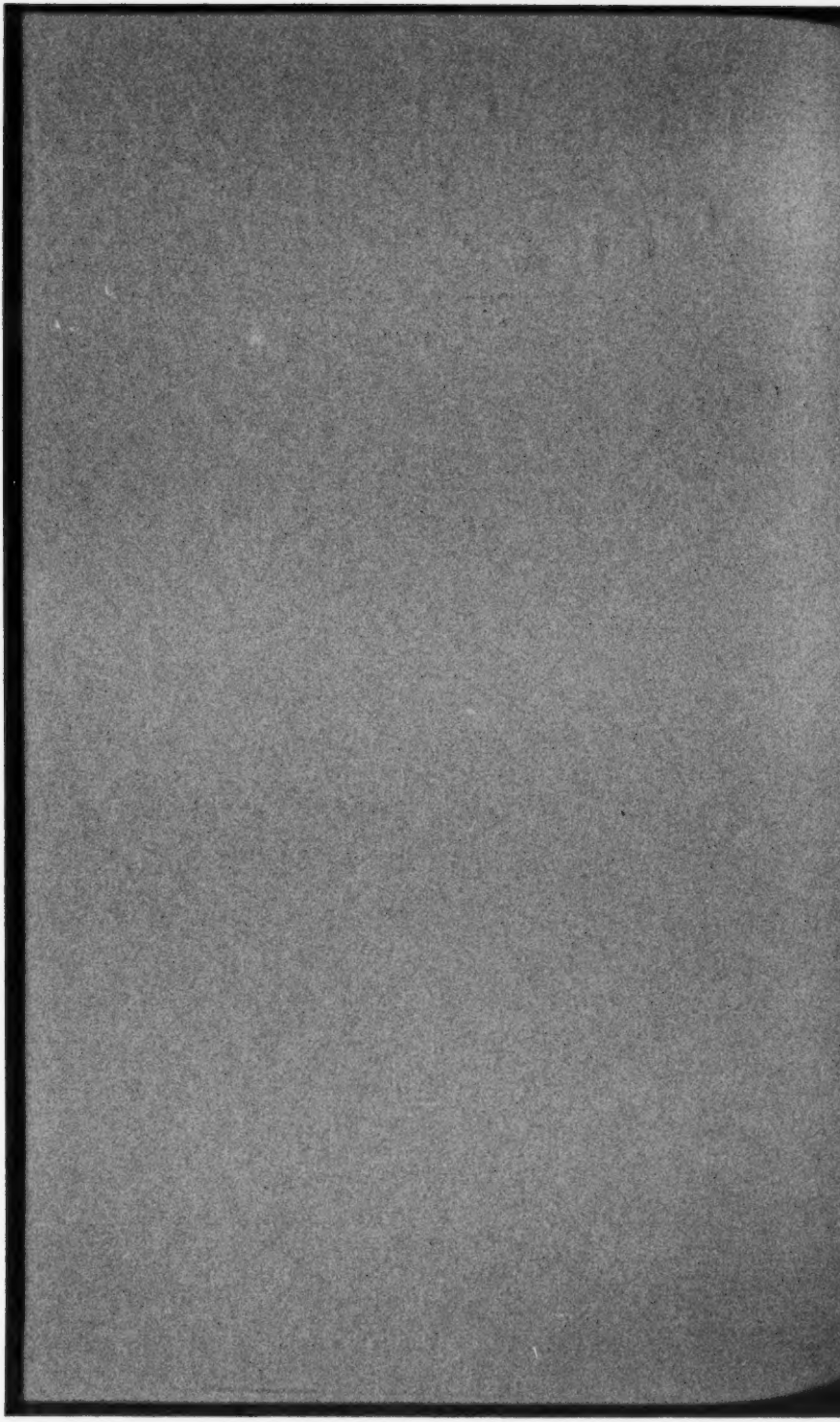

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Preliminary Statement.

The reasons advanced by the petitioner as being relied upon for the allowance of the writ are of such a flimsy character that at the very outset it appears doubtful, in the exercise of sound judicial discretion whether the petition should be granted. The petition does not disclose any special or important reasons for the allowance of the writ. On the other hand neither the record nor authority supports the claims of the petitioner. In opposition to the petition we will briefly indicate why this Court should not add to its calendar the unnecessary burden of a case already well decided by the District Court and by the Circuit Court of Appeals.

Respondent challenges the "Summary Statement of Matters Involved" contained in the Petition for Writ. It is replete with careful ambiguities and silences obviously designed to give the appearance of a cause proper for review by this Court and to fit the authorities by which petitioner hopes to impress this Court. The most cursory examination of the record will show this to be an appearance possible only by ignoring the most important facts contained in the record. These facts, omitted from the petition, will demonstrate that an issue of fact was before the trial Court; that it determined that issue adversely to petitioner; that having done so it applied oft-enunciated principles of law and concluded in favor of respondent. The Circuit Court reached the same reasonable conclusion. A question of fact only being presented, which is supported by substantial evidence, this Court will not review the lower Courts' decisions. Consideration of these same facts will also show that the cases cited in the petition are not in point.

For the sake of brevity we will not restate all of the facts before discussing the claims and authorities of petitioner but we will instead call the Court's attention to the facts in the record which make petitioner's claims unfounded and their authorities pointless.

We will then show that there is nothing for this Court to review in this cause and that the determination of the trial Court and Circuit Court is amply supported by authority.

I.

The Decision of the Circuit Court of Appeals Conforms to California Law.

Petitioner first claims that the decision in this case conflicts with *Blackburn v. Home Life Insurance Company of New York,* 19 Cal. (2d) 226, 120 Pac. (2d) 31 (1941). The *Blackburn* case merely states that additional provisions in the contract between the insured and insurer written upon a separate sheet and pasted on the policy itself become an integral part of the agreement where that is the obvious intent of the parties. This is nothing more than a restatement of the doctrine of integration of instruments. How that can affect the result in the case at bar and how *Blackburn v. Home Life Insurance Company, supra,* conflicts with the decision of the Circuit Court of Appeals, is not disclosed by the petition. It is a complete *non sequitur* to say that because two writings are integrated and deemed one agreement, two separate promises, each of a different thing are to be deemed one promise of the same thing. Under the terms of the policy contract provision was made for the reserve on the policy and the manner of its disposition. By the coupon rider the insured was promised certain moneys would be paid on certain dates upon surrender of certain coupons. The policy itself shows that the reserve and the coupons had no relation to each other. [R. 175, Exhibit 1.] There the policy provides a special method of calculating the reserve, what it shall consist of, the uses to which it may be put, and its basis as required by law. [R. 175, 178, 179, 180, 181, 182, 183.] On the other hand separate provision is made for coupons. They are not calculated or based upon mortality. They have noth-

ing whatever to do with reserve. [R. 196, Exhibit 1.] These two provisions contain two different promises having essentially different characteristics. Certainly no one would contend that the mere fact that provision is made in the same policy for reserve and a life benefit of $10,000 provokes the conclusion that reserve and life benefit are one, and yet the matured coupons are in the same class as a matured life benefit.

Any idea of a possible conflict between the decision of the Circuit Court of Appeals is immediately dispelled by a consideration of certain of the facts found to be true in this case which are ignored by the petitioner. These facts are: (1) the policy itself defines "reserve" and it does *not* include the credits or values of unused due coupons within that term [Exhibit 1, R. 175, 183]; (2) the purchase agreement itself defines a lien as a policy loan and by the terms of the policy this could not be placed on the coupons, since only the reserve was subject to policy loan provisions [Exhibit 2, R. 206, 214]; (3) the word "reserve" has a technical, special and well understood meaning in the life insurance business which does not include coupon values or credits [R. 306-310, 321, 355]; (4) the words "terminal reserve" do not refer to any matured policy claim [R. 355]; (5) the matured unused coupons which were a part of this policy were matured policy claims [R. 355]; (6) the trial Court believed the evidence of respondent concerning the meaning of the words "terminal reserve" and found as a fact that terminal reserve did not include the unused matured coupons [Findings XVI, R. 116, *et seq.*]; (7) the reserve on a life insurance policy can be established in the accounts of the company and those accounts will control

only if the insurance policy does *not* itself establish the reserve [R. 346]; (8) where the policy itself does establish the reserve as here, the policy provisions control the accounts and the phrase "terminal reserve . . . as such reserve has been established in the accounts" must be taken in the insurance business to mean the reserve correctly set up in the accounts of the company as determined by the policy itself and this would not include an incorrect amount set up in the accounts as reserve [R. 343-354]; (9) the reserve determined by the policy controls and the accounts are limited to the amount so determined [R. 343-354]; (10) and the trial Court and Circuit Court so found and held [R. 116, *et seq.*, 791].

Thus whether we consider the coupon rider and the main policy as one instrument or two, the evidence shows that the matured coupons and the reserve on the policy are two different and separate rights created by the policy contract in the insured.

The authorities support this conclusion. See:

Helvering v. Intermountain Life Insurance Co., 294 U. S. 686, 79 L. Ed. 1227 (Oct. Term, 1934);

Continental Assurance Co. v. United States, 8 Fed. Supp. 474 (Ct. Claims 1934);

Helvering v. Missouri State Life Insurance Co., 78 Fed. (2d) 778 (C. C. A. 8, 1934);

Helvering v. Atlas Life Insurance Co., 78 Fed. (2d) 166 (C. C. A. 10, 1935);

Helvering v. Montana Life Insurance Co., 84 Fed. (2d) 623 (C. C. A. 9, 1936);

Fox v. Mutual Benefit Life Insurance Co., 107 Fed. (2d) 715 (C. C. A. 8, 1939).

Petitioner also claims (Petition, p. 16) that the decision below conflicts with certain California cases because it "applied the rule of strict construction against petitioner as a rule of first resort, and sustained the District Court in excluding evidence offered by petitioner of the intention and understanding of the parties to the Purchase Agreement at the time of its execution." The evidence so claimed to have been rejected consisted of Exhibit H [R. 626], Exhibit I [R. 628] and Exhibit J [R. 630]. A mere inspection of these exhibits shows that they are immaterial to the issue which petitioner seeks to raise. They do not show the intent of the parties at the time of the execution of the Purchase Agreement—September 7, 1933. They were prepared by one not a party to the agreement, and Exhibit H speaks as of June 30, 1933, Exhibit I speaks as of June 30, 1933, and Exhibit J speaks as of June 30, 1933. This is prior to the commencement of negotiations, for the decree of insolvency and order transferring the assets of the Missouri State Life Insurance Company to the Superintendent of Insurance was not made until August 28, 1942. It is clear from this that the evidence offered does not come within the rule claimed by petitioner to be applicable. This being so, the basis of conflict claimed by petitioner to exist between the decision of the Circuit Court of Appeals and the cases cited by him on pages 17 and 18 of the petition fails.

The decision of the Circuit Court of Appeals is not in conflict with *Balfour v. Fresno Canal & Irrigation Company*, 109 Cal. 221, 41 Pac. 876 (1895) for the following reasons:

1. That case limits the admissible evidence in cases of ambiguity to the conversations and declarations of the parties during the negotiations at and before the time of the contract, and petitioner in its offer of proof did not offer to prove, nor did he suggest, nor do the rejected exhibits indicate in any way, that this evidence was mentioned or considered during the negotiation of the Purchase Agreement [Exhibit 2].

2. The *Balfour* case holds that where there is no ambiguity extrinsic evidence is inadmissible. Here there was no ambiguity as to the words "terminal reserve" and hence no evidence was admissible of surrounding circumstances for the purpose of interpreting those words.

3. The ambiguity, if any, was in the words "as such reserve has been established in the accounts of the old company" and this ambiguity referred only to what documents might be considered as "accounts" of the company. The trial Court found as a fact that Exhibits H, I and J constituted no part of the accounts of the old company when it sustained respondent's objection to their admission in evidence [R. 632-711]. This finding of fact is conclusive on this Court as it was deemed to be on appeal to the Circuit Court of Appeals [R. 791].

4. The petitioner claims for the first time that it offered the rejected evidence for the purpose of construing the words "terminal reserve". In the trial Court it offered this evidence only as a part of the "accounts of the old

company" upon the theory that the reserve there established was binding upon the parties. This appears in the evidence and statements of counsel. [See R. 330, also R. 493-711.]

The decision of the Circuit Court of Appeals is not in conflict with *United Iron Works v. Outer Harbor, Dock and Wharf Company,* 168 Cal. 81, 141 Pac. 917 (1914), for the same reasons advanced above with reference to the *Balfour* case, *supra.*

The decision of the Circuit Court of Appeals is not in conflict with *Mitau, et al v. Roddan, et al,* 149 Cal. 1, 84 Pac. 145 (1906) for the following reasons:

1. This case holds that the practical construction of a contract between parties with the knowledge and consent of the parties to the contract is evidence of what was intended by the provisions. This is assuming that the terms of the contract are ambiguous.

2. Petitioner did not prove, nor offer to prove, any act or construction of the contract here in question by all of the parties thereto.

3. Petitioner did not prove, nor offer to prove, that the parties to the Purchase Agreement had any knowledge of the facts which it claims evidence the practical construction placed upon the agreement by petitioner and, on the contrary, the evidence shows that any such intent or claimed "practical construction" was a secret intent upon

the part of petitioner not known to any other party to the contract.

4. The contract itself was not ambiguous, at least not so far as the words "terminal reserve" are concerned, and the only ambiguity, if any, is as to the words "as such reserve is established in the accounts of the old company."

The decision of the Circuit Court of Appeals is not in conflict with the case of *Weaver, et ux v. Grunbaum, et al,* 87 Pac. (2d) 406 (1939) for the reasons advanced above with reference to *Mitau, et al v. Roddan, et al, supra.* It should be noted in each of these cases that the agreements construed were ambiguous and that the construction placed upon the contract by the parties thereto was with the knowledge and acquiescence of both parties, whereas in the case at bar no knowledge on the part of respondent was sought to be shown, nor does the rejected evidence tend to show in any manner a construction acquiesced in by all parties to the agreement. On the contrary, the evidence is primarily evidence of the acts of a third party, to-wit, the Missouri State Life Insurance Company which was declared insolvent August 28, 1933. The excluded portions of Exhibit E [R. 610] and Exhibit G [R. 618] were notations made upon the old original records of Missouri State Life Insurance Company by the petitioner after the execution of the purchase agreement without the knowledge of respondent, insured, or any other party to the agreement other than petitioner itself. Such evidence could not under any circumstances bind respondent.

II.

The Decision of the Circuit Court of Appeals Does Not Conflict With Any Decision of Other Circuit Courts of Appeals.

The petitioner states on page 19

> "the question whether incidental features of the contract may be considered separately or allowed to change the fundamental nature of the contract in which they are integrated has been answered in the negative by the Circuit Court of Appeals for the Sixth Circuit in In re Weick, 2 Fed. (2d) 647 and in *Maskowitz v. Davis,* 68 Fed. (2d) 818 and by the Circuit Court of Appeals for the First Circuit in *Old Colony Trust Company v. Commissioner of Internal Revenue,* 102 Fed. (2d) 380."

This statement contained in the petition is as unintelligible and pointless as are the cases cited. It is the same as though the petitioner had stated that the question of whether the coat is red or black has been answered in the negative, and is just about as relevant. We have already pointed out in connection with *Blackburn v. Home Life Insurance Company of New York,* 19 Cal. (2d) 226, 120 Pac. (2d) 31, in the first part of this brief that cases referring to integration of instruments can not affect the result reached by the District Court and Circuit Court of Appeals, nor are they in conflict with that result. Reference is made to the discussion in connection with the *Blackburn* case.

On page 20 of the petition are cited four Federal cases decided by Circuit Courts of Appeals to the effect that in case of ambiguity evidence of the intention of the parties at the time the contract was executed is competent

to assist the court in correctly construing the contract. These cases state the same rule existing in California and are clearly not in conflict with the decision of the Circuit Court of Appeals upon petitioner's own statement of their holding. Reference is made to the discussion in connection with *Balfour v. Fresno Canal and Irrigation Company,* 109 Cal. 221, 41 Pac. 876 (1895), and *United Iron Works v. Outer Harbor, Dock and Wharf Company,* 168 Cal. 81, 141 Pac. 917 (1914) in the foregoing part of this brief wherein we pointed out the reasons why the decision of the Circuit Court of Appeals in the case at bar was not in conflict with those cases. The same reasons may be applied to the cases cited on page 20 of the petition.

Petitioner contends that the application of the rule of construction against an insurer's own phraseology is in conflict with certain Circuit Court of Appeals decisions in so far as it is applied to the Purchase Agreement. In support of this he cites *Bruckner-Mitchell v. Sun Indemnity Company,* 82 Fed. (2d) 434; *Alliance Life Insurance Company v. Seliba,* 87 Fed. (2d) 937 (C. C. A. 8); and *Stevens v. Life Assurance Society,* 101 Fed. (2d) 383, 390 (C. C. A. 7). The *Bruckner-Mitchell* case and *Alliance Life Insurance* case, *supra,* do not support the claims of petitioner. They do not deal with a purchase and assumption contract such as is here under consideration and on the contrary they deal solely with re-insurance agreements. The *Stevens* case is the only case even remotely in point and in that case the Court does not hold

that the rule of construction against the insurer should not be applied as is indicated by the language of the Court immediately following that quoted by the petitioner, which is as follows:

> "We do not believe that the circumstances under which the reinsurance contract was drafted and executed by the defendant and the receiver called for the application to it of the rule of construction that ambiguities of language be resolved against the insurer. *However, that is an academic question in this case, since we find no ambiguities of language in any provisions material to our investigation in this appeal.*"

But this case cannot control even though we assume *arguendo* that it states the rule contended for by petitioner. The reason is obvious, for the Circuit Court of Appeals in the case at bar placed its decision upon the fact that

> "appellant repeatedly contended below that the phrase 'terminal reserve on each policy of life insurance and each annuity policy as such reserve has been established in the acts of the old company' was inserted in the contract at the insistence of the appellant insurer."

Thus the general rule that language will be construed against the party using it which is established in both Federal and California decisions is applicable regardless of the life insurance angles to the contract in the case at bar.

III.

The Petition for Certiorari Presents No Question for Review by This Court.

The petition for certiorari reveals that petitioner's only complaint is that the trial Court rejected Exhibits H, I, J, E and G, together with certain proffered oral evidence explanatory thereof. Stripped of nonessentials petitioner complains that it was error for the trial Court to reject this evidence and that the Circuit Court of Appeals decision sustaining the trial Court conflicts with local and federal decisions for these reasons: (1) The contract was ambiguous and the evidence should have been received as evidence of the surrounding circumstances for the purpose of showing the intent of the parties to the agreement; (2) The contract was ambiguous and the evidence should have been admitted to show the construction placed upon the contract by the parties themselves; (3) The Circuit Court of Appeals erred in applying the rule of construction against the insurer's own phraseology.

Brief considerations of these points will demonstrate that not one is now reviewable on appeal. It is a well established rule that questions of the admissibility of evidence are for the determination of the Court; and this is so whether its admission depends upon law or fact. Where it depends upon a preliminary question of fact, the finding of the trial Court upon such preliminary question of fact is not subject to reversal on appeal if it be fairly supported by the evidence. (*Gila Valley, G. & N. R. Co. v. Hall,* 232 U. S. 94, 58 L. Ed. 521 (1913).)

With this rule of appellate practice in mind the exclusion of the rejected evidence by the trial Court is con-

clusive upon this Court, as it was upon the Circuit Court of Appeals.

The rejected evidence was not admissible as evidence of the circumstances surrounding the execution of the purchase and assumption agreement unless the trial court first found the following preliminary facts to exist upon evidence adduced by petitioner:

(a) that the contract was ambiguous and susceptible of two constructions; (b) that in negotiating the purchase agreement the parties thereto were aware of the proffered evidence and contracted with reference thereto; (*Balfour v. Fresno Canal Irrigation Co.*, 109 Cal. 221, 41 Pac. 876 (1895)); (c) the proffered evidence was offered for the purpose of removing an uncertainty in the language of the contract but not for the purpose of raising a doubt in the clear meaning of its terms. (*Hercules Glue Co. v. Littooy,* 25 Cal. App. (2d) 182, 76 Pac. (2d) 700); and (d) that the proffered evidence had some probative bearing upon the intent of the parties in relation to the agreement entered into (*Paulin v. Paulin,* 39 Cal. App. (2d) 180, 185, 101 Pac. (2d) 809 (1940)). There can be no doubt but that the trial court found against petitioner on the preliminary matters designated (b), (c) and (d) above. First, nothing appears in the offer of proof or in any of the preliminary foundation evidence that Exhibits H, I, J, E and G, were used or referred to or considered in the negotiations leading up to the execution of the purchase agreement dated September 7, 1933. [R. 599-711.] Second, the proffered evidence was not offered for the purpose of removing an uncertainty, but on the contrary the evidence was offered upon the theory that the exhibits constituted a part of the accounts

of the old company and that as such they were the documents referred to in the provision "as such reserve is established in the accounts of the Old Company." Third, in order that the rejected evidence might have some probative bearing upon the intent of the parties, it was necessary that it be shown by the petitioner that the parties to the purchase agreement considered this evidence in their negotiations, and that it had some direct bearing upon the meaning of the words "Terminal Reserve", or that the rejected evidence constituted some part of the accounts of the Old Company within the meaning of the phrase "as such reserve is established upon the accounts of the Old Company".

As we have indicated before, the Court found as a fact against the defendant after consideration not only of the evidence in the record, but also of the statements of counsel, and in examination of the documents offered. It is clear also, that the words "terminal reserve" govern the provision with reference to accounts, and as indicated by the Circuit Court of Appeals, it is such a reserve on each policy of *life* insurance so limited which appellant was required to show was "established in the accounts". This, petitioner could not do. Furthermore, this construction is a reasonable one, and when the construction given the instrument by a trial court appears reasonable and consistent with the intent of the parties making it, appellate courts will not substitute another interpretation though it seems equally tenable.

Estate of Bourn, 25 Cal. App. (2d) 590;

Estate of Mallon, 34 Cal. App. (2d) 147;

Adams v. Petroleum Midway Co. Ltd., 205 Cal. 221.

The rejected evidence was not admissible to show the construction placed upon the contracts by the parties themselves unless as a preliminary matter it were first shown that (a) the part of the contract sought to be interpreted was ambiguous; (b) the particular construction placed upon the contract was placed thereon openly and was actually within the knowledge of all the parties to the agreement; and (c) all the parties with knowledge of such particular construction acquiesced therein.

At no time did petitioner prove or offer to prove any one of these preliminary facts. In the petition on file the principal contention is with reference to the phrase "terminal reserve". In that connection the record shows that in the trial court the only question was the technical and special meaning of those words in the life insurance business.

Where technical words or phrases are used in a contract, such as "terminal reserve" in the contract in the case at bar, expert testimony is admissible for the purpose of showing that such words have a technical, special and well defined meaning. Such testimony merely explains the meaning of the language as used in the contract.

In recognition of that rule the Supreme Court of the United States in *Moran v. Prather,* 23 L. Ed. 121, at page 122, said:

> "Cases arise, undoubtedly, in which the testimony of expert witnesses is admissible to explain terms of art and technical words or phrases, and it may be admitted that a certain instrument may be so interspersed with such technical terms that it would be error in the court to exclude the testimony of persons skilled in such matters, if duly offered by the proper party in the litigation."

See, also:

22 C. J., Sec. 1602, p. 1203;

20 Am. Jur., pp. 1004-1005, Sec. 1151;

Wigmore on Evidence, 2d Ed., Sec. 1955, pp. 171-172;

C. C. of California, Sec. 1645.

The only ambiguity, if any, arose with reference to what constituted these "accounts" and what force should be given to the words as "established in the accounts of the Old Company". The evidence offered did not even approach an attempt to prove a particular construction. With the exception of the excluded portions of the Exhibits E and G all the other evidence concerns the activities of a stranger to the contract, to-wit, Missouri State Life Insurance Co., whose reports were neither known nor considered by any other party to the agreement. The excluded portions of Exhibits E and G were added by petitioner apparently as a memoranda for its own benefit. They were not known by any other person, and hence were not acquiesced in by them. It is also obviously apparent that the parties to the agreement in suit are not the Superintendent of Insurance of the State of Missouri, and the General American Life Company, but the parties to the agreement in suit are the petitioner and respondent. This is so for the reason that the agreement between the General American Life Insurance Company and the Superintendent of Insurance was a third party beneficiary contract, and as such constituted an offer to all policy holders. When accepted by them it constituted an agreement between themselves with reference to their individual policies and the petitioner General American Life Insurance Company. Any construction placed upon that agree-

ment between the policy holder and the Company would necessarily have to be acquiesced in by the policy holder and the Company before it could be considered as evidence of the intent of the parties. Petitioner did not attempt to prove that the insured ever heard of the entries improperly made by the Company on Exhibits E and G.

Finally, petitioner contends that the Circuit Court of Appeals erred in applying the rule of construction against the insurer's own phraseology. It seems to be under the misapprehension that this rule was applied because the Circuit Court of Appeals was considering a life insurance policy. Petitioner also seems to be under the misapprehension that only in the case of life insurance policies is such a construction used. Respondent submits that the decision of the Circuit Court of Appeals was clear on this point. Thus, that Court states "Appellant repeatedly contended below that the phrase 'terminal reserve' on each policy of life insurance and each annuity policy as such reserve has been established in the accounts of the 'Old Company' was inserted in the contract at the instance of the appellant insurer." [R. 790.] With this fact before it, the Court followed the general rule of California law, and as we understand it, the law of every common law jurisdiction, that the phraseology of a contract will be construed against the person responsible for its usage. See Sec. 1654, Civil Code of California. That is what the Court did in this case. It would make no difference whether this were a purchase agreement, a policy of life insurance, or a simple agreement of sale, the same rule would be applied in any instance. It is clear from this that the opinion of the Circuit Court of Appeals is correct on its face and that therefore this Court will not grant a writ of certiorari.

IV.

The Decision of the Circuit Court Is Amply Supported by Authority.

Since the question of the meaning of the purchase agreement is challenged in this proceeding, we will here set forth the authorities which support the decision of the Circuit Court of Appeals and the trial court, with respect to that agreement. The decision below may be sustained upon either of two grounds. A consideration of the purpose and intent of the lien of the purchase agreement will lead irrevocably to the conclusion that it cannot affect the coupon values. A consideration of the meaning of the words used in the purchase agreement as they have been judicially defined will lead to the same conclusion.

First. The purpose of a lien in an agreement of this type is simply to reduce the liabilities of an insurance company to the extent necessary to make them fit the assets without making it appear that any obligation has in fact been repudiated. This is done by cutting down the principal obligation which an insurance company has, to-wit, the technical life "reserve" which does not include any fixed value such as coupons. Nevertheless, this whittling down process is accomplished in such manner that the profits on the business may ultimately restore the obligation to its full value, thereby causing no loss to any creditor or policy holder. This can be done only by placing an individual policy loan upon each policy of life insurance by a device known as a lien upon the reserve. A policy loan may be placed only upon the reserve of each policy of life insurance to the extent defined in each particular policy, since if the policy loan or lien were to exceed the amount provided or allowed in

any particular policy, that policy would lapse by its own terms. This being true, in any case where a policy loan had already been made upon the policy, the only amount available for an additional policy loan would be the difference between the policy loan value fixed by the policy and the total policy loan already in existence. Thus the provision in the "purchase agreement" that in no case should the lien exceed the difference between any policy loan and the total reserve of the policy loan value on the policy. The policy in suit fixed the amount of the policy lien at 50% of the "terminal reserve" and expressly provided that the lien should be treated in all respects and with like effect as policy loan indebtedness. [R. 214.] In computing this lien no consideration could be given to coupons, especially the matured and unused coupons. They were no part of the reserve, and bore no relation to the terminal reserve. They were no part of the policy loan value. Being no part of the policy loan value, there was nothing upon which an insurance lien might be placed in connection with such coupons. Hence, the conclusion follows that the coupons were not affected by the total lien and were available to prevent a forfeiture. For a full discussion of this matter, see *Watts Life Insurance Reorganization,* 29 Ill. L. R. 559.

Second. The following is a brief statement of the points and authorities upon which respondent relies.

The intent of the parties to the "purchase agreement" can be and must be ascertained from the terms of the instrument itself.

Brandt v. Cal. Dairies, Inc., 4 Cal. (2d) 128; 48 Pac. (2d) 13 (1935);

Barnhart Aircraft, Inc. v. Preston, 212 Cal. 19; 297 Pac. 20 (1931).

By the "purchase agreement" petitioner assumed all obligations of the Old Company, including the policy in suit, and policy holders and creditors could elect whether they would file a claim against the receivers or accept the provisions of the "purchase agreement". *Lovell v. St. Louis Mutual L. I. Co.*, 111 U. S. 264 (1884); *Lucas v. Pittsburg L. & T. Co.*, 137 Va. 255, 119 S. E. 109 (1923); *Watts Life Ins. Reorganization*, 29 Ill. L. R. 559. In this case the insured elected to accept the provisions of the "purchase agreement" and by his acceptance a contract was effected between petitioner and respondent, the only basis of which was the terms of the agreement as written. In the agreement technical words were used. The words "terminal reserve" being technical words and having a special and well understood meaning in life insurance business, the evidence of experts was admissible for the purpose of proving the meaning of those words. (See authorities cited above.)

The words "as such reserve has been established in the accounts of the Old Company computed as of September 1, 1933, to the date to which premiums on such policies have been paid" relate back to the words 'terminal reserve" for the word "such" always refers to an antecedent in the context of the instrument. Here it refers to terminal reserve.

Mitchell v. Packham, 103 Md. 693, 63 At. 219 (1906);

Webster's International Dictionary;

Summerman v. Knowles, 33 N. J. L. 202 (1868);

Evan v. State, 150 Ind. 651, 50 N. E. 820 (1898);

Warner Elevator Mfg. Co. v. Houston, 28 S. W. 405 (Tex. 1894).

The words "terminal reserve" as used in the "purchase agreement" had no reference to and did not include the credits and values evidenced by the matured coupons.

Testimony of Mr. Herfurth, R. 355, 359-378;

Testimony of Mr. May, R. 511-519;

Helvering v. Intermountain Life Insurance Co., 294 U. S. 686, 79 L. Ed. 1227 (Oct. Term, 1934);

Continental Assurance Company v. United States, 8 Fed. Supp. 474 (Ct. Claims, 1934);

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Fox v. Mutual Benefit Life Ins. Co., 107 Fed. (2d) 715 (C. C. A. 8, 1939).

The trial court found as a fact based upon expert testimony that the coupon values and credits could not be included within "terminal reserve" and that hence the lien did not relate to or affect the coupons. This court is *bound* by this finding of fact.

Runkle v. Burnham, 153 U. S. 216, 38 L. Ed. 694;

Dooley v. Pease, 180 U. S. 126, 45 L. Ed. 457;

Canadian Nat. Ry. Co. v. Geo. M. Jones Co., 27 Fed. (2d) 240 (C. C. A. 6);

Corey v. Atlas Coal & Coke Co., 277 Fed. 138 (C. C. A. 6);

Templar Motors Co. v. Bay State Pump Co., 289 Fed. 24 (C. C. A. 6);

Hathaway v. First National Bank of Cambridge, 134 U. S. 494, 10 S. Ct. 608, 33 L. Ed. 1004.

In view of all the foregoing, we believe that the Court must, and that it will deny the petition for a writ of certiorari.

Respectfully submitted,

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